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| 09/207,634      | 12/09/1998  | JOSEPH J. BERKE      | 1374-098            | 7083             |

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EXAMINER

AVERY, BRIDGET D

ART UNIT

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3618

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Paper No. 18

Application Number: 09/207,634  
Filing Date: December 09, 1998  
Appellant(s): BERKE ET AL.

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EXAMINER'S ANSWER

This is in response to the appeal brief filed September 24, 2001 and the amended appeal brief filed December 13, 2001.

**(1) *Real Party in Interest***

A statement identifying the real party in interest is contained in the brief.

**(2) *Related Appeals and Interferences***

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

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**(3) Status of Claims**

The statement of the status of the claims contained in the brief is correct.

**(4) Status of Amendments After Final**

No amendment after final has been filed.

**(5) Summary of Invention**

The summary of invention contained in the brief is correct.

**(6) Issues**

The appellant's statement of the issues in the brief is substantially correct. The changes are as follows: The applicant has not addressed the issues related to the final rejection of claim 9, 12 and 14 <sup>further</sup> in view of Arias et al. (US Patent 4,261,447). The applicant has not addressed the issues related to the final rejection of claims 12 and 14 <sup>further</sup> in view of Smith (US Patent 4,044,784).

The prior art rejection of claim 13 is being withdrawn.

**(7) Grouping of Claims**

The rejection of claims 5-9, 12, 24 and 27 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

The rejection of claim 13 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

The rejection of claims 10, 14, 25 and 28 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

The rejection of claims 20-23 and 26 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

**(8) Claims Appealed**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(9) Prior Art of Record**

|           |              |         |
|-----------|--------------|---------|
| 5,697,624 | FARAJ        | 12-1997 |
| 5,621,950 | WHITE        | 4-1997  |
| 5,301,393 | BROWN        | 4-1994  |
| 4,261,447 | ARIAS ET. AL | 4-1981  |
| 4,044,784 | SMITH        | 8-1977  |

**(10) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and

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the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 5-8, 10, 20, 21 and 24-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Faraj (US Patent 5,697,624) in view of White (US Patent 5,621,950).

Faraj discloses a cart for transporting grocery bags and cartons. The cart including a support member (12), a handle (24), a plurality of hooks (26) for receiving a handle, and a storable lower shelf/platform (30). With respect to claims 6 and 24-28 and applicant's claim of two wheels, see column 2, lines 31-33.

White discloses a detachable carrier having a pair of elongated jaws (12, 14), a means (16) for clamping the jaws (12, 14) to and releasing the jaws (12, 14) from an upper portion of a bag or sack, a handle (32), having a closed loop (36), attached to at least one of the jaws (14), and, a gripping surface (20, 24) including a plurality of small triangular, outward extending portions (38) for retaining and supporting a closed bag or sack.

Based on the teachings of White, it would have been obvious to one having ordinary skill in the art, at the time the invention was made to combine the bag carrier with the cart of Faraj to facilitate ease in transporting bags without handles.

Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Faraj ('624) and White ('950) and further in view of Arias et al. (US Patent 4,261,447).

Faraj and White disclose the features described above.

Faraj and White fail to disclose an adjustable shelf.

Arias et al. teach a suitcase cart having a base and legs (40) with telescoping tubes (54).

Based on the teachings of Arias et al., it would have been obvious to one of ordinary skill in the art to modify the combination of Faraj and White to include an adjustable shelf with telescoping tubes to support items of various sizes.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Faraj ('624) and White ('950) and further in view of Smith (US Patent 4,044,784).

Faraj and White disclose the features described above.

Faraj and White fail to disclose a cart having an adjustable height.

Smith discloses an adjustable height walking aid cane.

Based on the teachings of Smith, it would have been obvious to one of ordinary skill in the art to modify the combination of Faraj and White to include a support body where the height is adjustable using telescoping tubes to accommodate users of varying heights.

Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Faraj ('624) and White ('950) in view of Smith (US Patent 4,044,784).

Faraj discloses a cart for transporting grocery bags and cartons. The cart including a support member (12), a handle (24), a plurality of hooks (26) for receiving a handle, and a storable lower shelf/platform (30).

White discloses a detachable carrier having a pair of elongated jaws (12, 14), a means (16) for clamping the jaws (12, 14) to and releasing the jaws (12, 14) from an

upper portion of a bag or sack, a handle (32), having a closed loop (36), attached to at least one of the jaws (14), and, a gripping surface (20, 24) including a plurality of small triangular, outward extending portions (38) for retaining and supporting a closed bag or sack.

Smith discloses an adjustable height walking aid cane.

Based on the teachings of White, it would have been obvious to one having ordinary skill in the art, at the time the invention was made to combine the bag carrier with the cart of Faraj to facilitate ease in transporting bags without handles.

Based on the teachings of Smith, it would have been obvious to one of ordinary skill in the art to modify the combination of Faraj and White to include a support body where the height is adjustable using telescoping tubes to accommodate users of varying heights.

Claims 5-8, 10 and 20-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Faraj ('624) in view of Brown (US Patent 5,301,393).

Faraj discloses a cart for transporting grocery bags and cartons. The cart including a support member (12), a handle (24), a plurality of hooks (26) for receiving a handle, and a storable lower shelf/platform (30). With respect to claims 6 and 24-28 and applicant's claim of two wheels, see column 2, lines 31-33.

Brown discloses a detachable carrier having a pair of elongated jaws (20, 18), a means (24, 26) for clamping the jaws (20, 18) to and releasing the jaws (20, 18) from an upper portion of a bag or sack, an integral handle portion (12), having a closed loop (14), attached to at least one of the jaws (18), outwardly extending bosses (28), which bosses (28) are received or accommodated in through holes (30), and, a gripping

surface (18) including a plurality of small outward extending portions (40) for retaining and supporting a closed bag or sack. With respect to claim 22, it is noted that Brown's clip is constructed of all metal (see column 1, lines 66) therefore the metal strip claimed by applicant is shown as an integral feature with the jaws of Brown. It would have been obvious to one having ordinary skill in the art, at the time the invention was made, to make the metal strip as a separable component for maintenance and replacement. With respect to claim 23, see column 5, lines 51-54. Note, the bosses and holes, taught by Brown, are functionally equivalent to the applicant's claimed bolt and thumb nut. The selection of any of these known equivalents to attach elements would be within the level of ordinary skill in the art.

Based on the teachings of Brown, it would have been obvious to one having ordinary skill in the art, at the time the invention was made to combine the bag carrier with the cart of Faraj to facilitate ease in transporting bags without handles.

Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Faraj ('624) and Brown ('393) and further in view of Arias et al. (US Patent 4,261,447).

Faraj and Brown disclose the features described above.

Faraj and Brown fail to disclose an adjustable shelf.

Arias et al. teach a suitcase cart having a base and legs (40) with telescoping tubes (54).

Based on the teachings of Arias et al., it would have been obvious to one of ordinary skill in the art to modify the combination of Faraj and Brown to include an adjustable shelf with telescoping tubes to support items of various sizes.



Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Faraj ('624) and Brown ('393) and further in view of Smith (US Patent 4,044,784).

Faraj and Brown disclose the features described above.

Faraj and Brown fail to disclose a cart having an adjustable height.

Smith discloses an adjustable height walking aid cane.

Based on the teachings of Smith, it would have been obvious to one of ordinary skill in the art to modify the combination of Faraj and Brown to include a support body where the height is adjustable using telescoping tubes to accommodate users of various heights.

Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Faraj ('624) and White ('950) in view of Smith (US Patent 4,044,784).

Faraj discloses a cart for transporting grocery bags and cartons. The cart including a support member (12), a handle (24), a plurality of hooks (26) for receiving a handle, and a storable lower shelf/platform (30). With respect to claims 6 and 24-28 and applicant's claim of two wheels, see column 2, lines 31-33.

Brown discloses a detachable carrier having a pair of elongated jaws (20, 18), a means (24, 26) for clamping the jaws (20, 18) to and releasing the jaws (20, 18) from an upper portion of a bag or sack, an integral handle portion (12), having a closed loop (14), attached to at least one of the jaws (18), outwardly extending bosses (28), which bosses (28) are received or accommodated in through holes (30), and, a gripping surface (18) including a plurality of small outward extending portions (40) for retaining and supporting a closed bag or sack.

Smith discloses an adjustable height walking aid cane.

Based on the teachings of Brown, it would have been obvious to one having ordinary skill in the art, at the time the invention was made to combine the bag carrier with the cart of Faraj to facilitate ease in transporting bags without handles.

Based on the teachings of Smith, it would have been obvious to one of ordinary skill in the art to modify the combination of Faraj and White to include a support body where the height is adjustable using telescoping tubes to accommodate users of various heights.

**(11) Response to Argument**

Applicant's arguments filed December 28, 2001 have been fully considered but they are not persuasive. The prior art relied upon teach the features of the applicant's claimed invention. Faraj ('624) discloses a cart for transporting bags and containers. Brown discloses a spring biased bag clip. White discloses a spring-biased clip.

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Faraj ('624) teaches a cart having hooks and a shelf for transporting bags or a container. The bags can be hooked onto the cart via a handle or handles (see column 2, lines 44-48). White teaches a spring-biased clip having a loop for hanging the clip (see column 4, lines 13-

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18) and gripping surfaces for maintaining an object there between. Brown ('393) teaches a spring-biased bag clip (see column 3, lines 56-62) having a hole for hanging the clip, and gripping surfaces for maintaining objects there between. Since Faraj ('624) is concerned with crushing goods if bags are stacked on top each other (see column 1, lines 29-38), based upon the prior art teachings, one having ordinary skill in the art would be motivated to provide a means for hanging a bag that doesn't have handles. The provision of gripping surfaces (also provided by White '950 and Brown '393) would have been obvious to one having ordinary skill in the art to prevent unintended release of the bags being transported.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

B.A.

February 11, 2002

Conferees

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